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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

GLORIA MAY KISTNER,

Defendant and Appellant.

B163479

(Los Angeles County
Super. Ct. No. LA 034704)

APPEAL from a judgment of the Superior Court of Los Angeles County. Harvey Giss, Judge. Affirmed.

Koryn & Koryn, Sylvia Koryn, under appointment by the Court of Appeal for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan, Supervising Deputy Attorney General, Stephanie A. Mitchell, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Gloria Kistner appeals her conviction of one count of grand theft of personal property (Pen. Code, § 487, subd. (a)). On appeal, she contends the court erred in making two key evidentiary rulings and by engaging in extensive questioning of the witnesses. Finding no abuse of discretion by the trial court, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY¹

Defendant, a claims representative of Farmer's Insurance Company, had authority to issue checks up to a certain amount payable to insureds to cover property damage claims. The prosecution's theory of the case was that during an approximately 10-month period from August 1998 through June 1999, she issued over \$234,000 in unauthorized checks to insureds; these checks were forged and deposited into the account of the construction company, Gray's Construction, hired to repair insureds' property. In turn, Gray's Construction paid her kickbacks by issuing checks to her cousin, Vandyke Jude. Defendant contended that the monies paid by the construction company to Jude were refunds for advances he made for construction materials that were not purchased.

Mark Kilgore was acting branch claims supervisor and branch claims supervisor from August 1998 through November 1998, and was at Farmer's Sylmar office until June 30, 1999, where he was defendant's supervisor. Kilgore thought highly of defendant as a claims representative.

1. The Claims Process.

Farmer's adhered to specific procedures for processing a property casualty claim and maintained certain file-keeping protocols. On a new claim, a loss report was generated, the claim was assigned a number and assigned to a claims representative. The claims representative would contact the insured to inspect the damages, and would

¹ A jury in a prior trial convicted defendant, but her motion for new trial on the ground of newly discovered evidence was granted. The facts herein are taken from the second trial.

prepare a “scope of damages” report after the inspection, which would be used to generate a repair estimate on the computer. A repair estimate was generated by the computer within three days of the inspection, and at this point, the claims representative would have custody of the claims file, where this information would be placed in an investigation log in the file. Some of this information (estimate, loss report, claim information) was also kept on the computer. Generally, the paper file contained more than the computer file, including pictures, contractor estimates, and diagrams.

Once the estimate was generated, a check payable to the insured and the mortgagee would issue.² If the claim was over the claims representative’s authority, the entire claim file would be submitted to the supervisor with a request for approval. A check over the authority amount could be requested and printed prior to approval, although that was not standard procedure. To issue the check, the claims representative or a designated clerk would use an access identification code to sign on to the computer and enter the information for the check; the check would be immediately output on the check printer. Farmer’s had a policy to secure the checks until mailed or delivered to the insured. Therefore, the checks were printed into a locked room, where a designated check retriever cut the check and compared it with the claims file to ensure the check was authorized and that the name and amount were correct. The check was then mailed. About 100 checks per day were printed.

Tracy Bonczek, a check retriever, testified she would not have a master list of the checks printed at any particular time. For each file, the checks were listed on the indemnity log, which would indicate whether the check was issued for property damage, liability, or loss of use; the log would also indicate the payee and the amount. Bonczek had a list containing each claims representative’s authority level for a file. She used the indemnity log in the file to verify the check was not over the amount of authority. If she

² A check in excess of \$5,000 would include the mortgage company as a payee.
~(RT 5812)~

took a break, she would put checks in a cabinet in the front of the office. This cabinet was only locked at night; it also contained other files and outgoing mail, so the claims representatives had access to the cabinet.³ When she was done reviewing the check and the file, she would normally mail out the check.

Supplemental checks could be issued where the initial estimate was insufficient to cover the repairs. In that instance, the claims representative would send an adjuster to the location to confirm the damage. In all other respects, the issuance of a supplemental check was similar to the original claim. Reinspection of the premises could be waived if the dollar amount was nominal and it was obvious from the discussion with the contractor it was appropriate to make payment. The supervisor's approval would not be necessary to reactivate the file or issue a supplemental check.

During the time at issue, Kilgore estimated that defendant handled approximately 1,000 files. A case review was supposed to occur monthly but often it did not happen. Kilgore admitted that the implementation of some of these procedures was "sloppy."

Generally, there was no rule concerning which contractor a claims representative could recommend, but Farmers wanted them to recommend more than one. Kilgore admonished his claims representatives to recommend two or three.

2. The Questioned Checks.

The checks at issue here were supplemental checks, and all related to the work of a single contractor, Gray's Construction. Defendant was the only claims representative who used Gray's Construction. Kilgore testified that he knew he did not approve the checks at issue because they were over his authority. Kilgore did not waive the inspections on any of defendant's files at issue.

³ Kilgore sometimes observed the check retriever leave checks unattended on desks.

The checks, all requisitioned by defendant, were as follows:

Insured	Supplemental Check
Murua	\$26,955.24.
Kairys	\$13,467.49.
Vallecilla	\$18,106.40.
Rhee	\$10,062.54, \$987.68, \$9,056.21.
Perez	\$15,016.39, \$19,715.65.
Barrow	\$9,521.65.
Rainey	\$15,249.60, \$14,007.81.
Shoalin	\$14,570.96, \$3,998.20.
Feller	\$19,657.15.
Hayrapetian	\$17,039.24.
Sweeney	\$19,821.26.
Dababneh	\$7,500.12.

Frank Jason, a branch claims supervisor, conducted an audit of defendant commencing in March 1999. He discovered that the checks made out to the 12 different insureds had been forged and deposited by Gray's Construction. These checks totaled \$234,733.58.

The insureds testified in detail concerning their claims. To summarize here, the insureds testified that they did not endorse any of the checks at issue that were payable to them, and even if defendant came to their house for the initial inspection (which she generally did not), she never returned to conduct any supplemental inspections.

Jason could not determine whether defendant had received any of the monies from the forged checks, whether she endorsed any of the forged checks, or whether she deposited the checks into the Gray's Construction account. The parties stipulated that

Vandyke Jude, defendant's first cousin, deposited checks into his account from Gray's Construction totaling approximately \$27,000.

3. Other Missing Checks.

Tracy Bonczek testified to an incident where several checks requisitioned by defendant disappeared. On June 11, 1999, Bonczek was at her desk with some checks when defendant approached her. Defendant asked whether Bonczek could retrieve three checks she had issued (Perez, Jahanbin, and Fanoie). Bonczek could not find the claims files to go with the checks, and told defendant she could not release the checks. Defendant promised to bring the files.

Bonczek put the checks in the cabinet, which defendant would have been able to see from Bonczek's desk. Defendant and Bonczek went to the cafeteria together, defendant left the cafeteria to make a phone call and Bonczek went to the restroom. About six to eight minutes later, defendant came into the restroom and told Bonczek she wanted to finish talking. Defendant left to take another phone call, then came back and left again. When Bonczek got back to her office, she continued to process the checks and place the "problem" checks in a pile. She noticed that some of the "problem" checks were missing because those were the ones for which she did not have the files. She never found the checks.

4. Actions of Gray's Construction

Venetta Wynne, an insurance broker, shared office space with Darnell (Don) Simmons beginning in 1997. Simmons's business was known as Gray's Construction. Initially, Wynne paid bills for Gray's Construction out of her own account because Gray's did not have an account. Later, she opened an account for Gray's Construction because Simmons could not open the account in his own name; she deposited the Farmer's checks into the Gray's Construction account. One time she cashed a \$5,000 check for Simmons, put the money in an envelope, and saw him give it to defendant.

Wynne denied signing the checks made on the Gray's Construction account which were payable to Jude Vandyke, but she recognized the writing on the checks as

Simmons's writing. Wynne did not know Simmons was getting excess payments from Farmer's, although he did tell her that there was someone in the office who was expediting his checks. She did not sign the deposit slips depositing checks from Farmer's. She deposited the Perez check for \$19,715.65, but did not sign his name on the back. Wynne testified the signatures on the other deposit receipts were Simmon's.

Vandyke Jude met Simmons in the summer of 1998. Jude contended the approximately \$27,000 in checks he received from Gray's Construction were in fact refunds for materials he asked Simmons to purchase for a building project in St. Lucia, where Jude's parents resided. Although Simmons never showed proof that he had purchased any materials, Jude gave him four installments of funds, eventually totaling \$40,000. In early 1999, Jude learned that Simmons had not obtained the material. Simmons refunded the money to Jude from February through April 1999 in the form of the checks he received from Gray's Construction.

Jude took David Mondragon, a contractor who had worked with Simmons in 1997 and 1998, with him to St. Lucia in May 1999. Checks written to Mondragon from Gray's Construction were for work performed.

5. Verdict and Sentence.

The jury returned a verdict of guilty, and found true the allegation that the amount taken was in excess of \$50,000. The court sentenced defendant to an aggregate term of three years, and ordered restitution to Farmer's in the amount of \$266,122.25.

DISCUSSION

I. EVIDENTIARY RULINGS.

Defendant first sought to introduce evidence that she had complained to Farmer's in 1996 that her files were being lost, she was overworked and the office was understaffed. She contends this evidence would have supported her defense that Farmer's accusations were an attempt to retaliate against her and use her as a scapegoat. She asserts the exclusion of this evidence was error.

Defendant also moved to exclude evidence concerning three checks that disappeared during her meeting with Bonczek; she now contends the court erred in allowing admission of the evidence.

A. Exclusion of Defendant's Memorandum At the Second Trial Was Not An Abuse of Discretion.

At defendant's first trial, the court held an Evidence Code section 402 hearing. The prosecution moved to exclude evidence and testimony concerning memoranda defendant wrote to her supervisors in 1996 and 1997 concerning missing files, file problems, and insufficient time to conduct inspections while she was working at the Grande Vista office. The prosecution argued these memoranda were irrelevant because they related to events occurring several years prior to the incidents at issue and concerned another office. Defendant argued the memoranda were relevant to refute the prosecution's contentions of theft because they demonstrated that Farmer's had a motive to terminate her because she was a complaining employee, and used her as a scapegoat to explain the thefts. The court permitted defense counsel to use the memoranda. The court also permitted the testimony of witnesses concerning defendant's complaints during that time period.

At the second trial, defendant sought to introduce a November 16, 1996 memorandum. The court performed an analysis under Evidence Code section 352, and cases related to third-party culpability, and found that the memorandum was not relevant to the offenses charged because she had been retained by the company and transferred to a different office. While the court found the evidence was marginally relevant, it concluded that there was insufficient linkage to connect this evidence to a theory that someone had set up the defendant for \$200,000 in thefts and put the money in her relative's account.

In making its ruling, the trial court relied in part upon *People v. Hall* (1986) 41 Cal.3d 826, to exclude evidence of third-party culpability. *Hall* held that "third-party evidence need not show 'substantial proof of a probability' that the third person

committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. As this court observed in *Mendez* [*People v. Mendez* (1924) 193 Cal. 39], evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Id.* at p. 833.) Thus, "courts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible . . . unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion" under Evidence Code section 352. (*Id.* at p. 834.)

Here, defendant's offer of proof showed motive only, and was thus insufficient. On these grounds, the court did not abuse its discretion. (*People v. Yeoman* (2003) 31 Cal.4th 93, 140; accord *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1137 [no evidence, beyond mere speculation, that third party either had been present with the victim on the day of her murder or had been shown to be connected to the crime in some other way]; *People v. Lewis* (2001) 26 Cal.4th 334, 373 [finding no abuse of discretion in rejecting evidence as too speculative that a particular third person committed the charged crimes].) Furthermore, even with the limited admission of this evidence at the first trial, the jury found defendant guilty.

B. The Admission of Tracy Bonczek's Testimony Concerning the Three Checks Was Not an Abuse of Discretion.

Prior to trial, defendant moved to exclude Tracy Bonczek's testimony concerning the three checks taken from the cabinet while Bonczek was in the cafeteria under Evidence Code section 1101, subdivision (a). She argued that the checks at issue (Jhanbin, \$820.00; Perez \$2,974.00,⁴ and Fanoe, \$3,964.41) were not charged in the

⁴ At trial, the prosecution contended the Perez check was one of those wrongfully issued. After payment was stopped on the three checks, defendant never asked for this check to be reissued. The defense contended the check was lawfully issued.

instant case, and thus were not relevant. She pointed out that Bonczek did not know who removed the checks; other checks were missing at the same time and the checks were in view of three different persons who would have seen someone taking them. Thus, the evidence did not show motive, plan or intent.

The prosecution's theory, however, was that the evidence was relevant to show continuing conduct. The court admitted the evidence, finding it was relevant circumstantial evidence to establish that defendant was involved in a scheme and that she took the checks because she was afraid of discovery. The court, in weighing the evidence, found that it was not more prejudicial than probative because "this is the natural flow of the evidence with the defendant's history at Farmer's. Great strikes could be made with it depending on how the People wish to argue the case."⁵

A determination under Evidence Code section 352 is entrusted to the sound discretion of the trial court and will not be overturned except upon a finding of manifest abuse, i.e., a conclusion that the decision was "palpably arbitrary, capricious and patently absurd." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314; *People v. Waidla* (2000) 22 Cal.4th 690, 724.) We will reverse on the grounds of erroneously admitted evidence only where it is reasonably probable a result more favorable to the defendant would have been obtained. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Evidence Code section 1101, subdivision (a) prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition. (*People v. Ewoldt*

⁵ At the hearing, although defendant raised the character evidence relevancy issue and the prosecution argued the evidence was admissible to show a plan or scheme, the court did not expressly rule on the Evidence Code section 1101 argument; rather, it relied on the general rule of relevance of Evidence Code section 352.

(1994) 7 Cal.4th 380, 393.) Evidence Code section 1101, subdivision (b) permits the introduction of evidence a person committed a crime or other wrongful act when relevant to prove some fact, such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident on the theory in such instance the evidence is not being used to establish the person's disposition to commit a crime. (Evid. Code, § 1101, subd. (b); *People v. Neely* (1993) 6 Cal.4th 877, 896-897.) Where the uncharged conduct is used to prove common plan or scheme, a lesser degree of similarity is required. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018.) The common features of each offense must "indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Ewoldt, supra*, at p. 403.) The uncharged conduct must demonstrate "'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'" [Citations]." (*Id.* at p. 402.)

Here, the question is whether the testimony was merely evidence of how defendant misappropriated the checks: did it tend to show defendant's scheme or plan to wrongfully obtain checks and launder them through third parties, or did it tend to show that defendant was of bad character? While there was no direct evidence of how defendant obtained the wrongfully issued checks, there was significant circumstantial evidence: the relevant files were missing; the files were required to determine if approval had been given for over-limit checks; checks were often left unattended in the cabinet or on desks; the checks ultimately ended up the account of Gray's Construction, the only contractor used in the case of the missing checks and a contractor only used by defendant. The totality of this evidence points to the existence of a scheme or plan. Thus, it was properly admitted under Evidence Code section 1101, subdivision (b), and there was no abuse of discretion in the balance struck under Evidence Code section 352.

II. THE TRIAL COURT’S QUESTIONING OF WITNESSES WAS NOT EXCESSIVE.

The trial court asked questions of several witnesses during examination and cross-examination. The court’s most extensive questioning came during the testimony of Jude, a critical witness to the defense case. During Jude’s examination, defense counsel moved for a mistrial, or for the court to recuse itself because it had been acting as prosecutor in this matter, arguing that because of the court’s questioning, defendant was not receiving a fair trial. Counsel argued, “The jury is sitting there. They are listening to the tone of the court. They are listening to the questions asked by the court. They are listening – they’re seeing the challenge, the manner in which the witness, Mr. Jude, is being challenged by the court. I believe the message is loud and clear. The message being, ‘this man is not telling the truth. I, the Judge, do not believe him. Therefore, he should not be believed.’”

The court denied the motion. The court stated, “I was not trying to be an advocate. And I felt that this was a critical area of the case, and that the jury was entitled to understand the time line regarding the giving of the money to the contractor and spending that money needlessly if it turned out to be that the decision was going to be contrary to the witness’s expectations.” The court gave the jury CALJIC No. 17.32, admonishing the jury that the court “have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness. If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion.”

The trial judge has the authority to question witnesses. (Evid. Code, § 775;⁶ *People v. Santana* (2000) 80 Cal.App.4th 1194, 1206.) “[I]t is not merely the right but

⁶ Evidence Code section 775 provides that “[t]he court, on its own motion or on the motion of any party, may call witnesses and interrogate them the same as if they had been produced by a party to the action, and the parties may object to the questions asked and the evidence adduced the same as if such witnesses were called and examined by an

the duty of a trial judge to see that the evidence is fully developed before the trier of fact and to assure that ambiguities and conflicts in the evidence are resolved insofar as possible.” (*People v. Carlucci* (1979) 23 Cal.3d 249, 255.) *Carlucci* noted that “however, we caution that the trial court must not undertake the role of either prosecutor or defense counsel. We have recognized that ‘It is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice. This requires that public officials not only in fact properly discharge their responsibilities but also that such officials avoid, as much as possible, the *appearance* of impropriety.’” (*Id.* at p. 258.) Therefore, the trial court must refrain from advocacy and “remain circumspect in its comments on the evidence, treating litigants and witnesses with appropriate respect and without demonstration of partiality or bias.” (*Ibid.*)

In its comments, the court may not “persistently make[] discourteous and disparaging remarks so as to discredit the defense or create the impression it is allying itself with the prosecution.” (*People v. Santana, supra*, 80 Cal.App.4th at pp. 1206-1207.) In *Santana*, the court conducted an extensive interrogation of defense witnesses, belabored points that were adverse to the defense, consumed more time than was necessary to establish the point, and adopted the prosecution’s terminology. (*Id.* at pp. 1200-1206.) *Santana* found error because “the trial court took on the role of prosecutor rather than that of an impartial judge. By continuing this adversarial questioning for page after page of reporter’s transcript, the trial court created the unmistakable impression it had allied itself with the prosecution in the effort to convict [defendant].” (*Id.* at p. 1207.)

Here, the evidence discloses that the judge primarily asked questions to clarify the evidence. Our review of the record indicates the questioning was for the most part neutral, neither favoring the defense nor the prosecution. Nothing in the court’s

adverse party. Such witnesses may be cross-examined by all parties to the action in such order as the court directs.”

questions indicate it had taken on the role of an advocate or that it was belaboring points adverse to the defense. Furthermore, Jude's testimony was quite lengthy and protracted; the quantity of the court's questioning was insignificant given the total amount of time Jude was on the witness stand. Finally, the jury was given the CALJIC cautionary instruction not to look to the court's conduct as indicating its beliefs on any matter. Absent evidence to the contrary, the jury is presumed to follow instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) The court did not improperly ally itself with either party in this case in a manner that would demonstrate partiality or bias to the jury.

DISPOSITION

The judgment of the superior court is affirmed.

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ZELON, J.

We concur:

PERLUSS, P. J.

JOHNSON, J.